

FILED

JUL 27 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE MARTINEZ-DE LOZA,

Defendant - Appellant.

No. 05-50246

D.C. No. CR-04-01321-MMM

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Margaret M. Morrow, District Judge, Presiding

Submitted July 24, 2006^{**}

Before: ALARCÓN, HAWKINS, and THOMAS, Circuit Judges.

Jose Martinez-De Loza appeals from the 40-month sentence imposed following his guilty plea conviction for illegal reentry following deportation, in

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the sentence and remand for correction of the judgment.

Martinez-De Loza contends that the district court's refusal to consider whether there was "unwarranted disparity" between his sentence and the sentences imposed on defendants who have been offered fast-track dispositions renders his sentence unreasonable under *United States v. Booker*, 543 U.S. 220 (2005). Upon review of the record, we conclude that the district court *did* consider potentially unwarranted sentencing disparity, but found that these principles were not implicated because fast-track defendants were charged with violating a different statute with lower penalties. This finding did not render his sentence unreasonable under *Booker*. See *United States v. Marcial-Santiago*, 447 F.3d 715, 717-19 (9th Cir. 2006). The district court calculated the advisory Guidelines range, considered and rejected Martinez-De Loza's contentions regarding sentencing disparity, weighed the 18 U.S.C. § 3553(a) sentencing factors in detail, and imposed a sentence – 17 months below the Guidelines range – that we conclude is reasonable under our case law. See *id.* at 719, citing *United States v. Plouffe*, 445 F.3d 1126, 1131 (9th Cir. 2006). We affirm the sentence.

In accordance with *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062 (9th Cir. 2000), we remand the case to the district court with instructions that it

delete from the judgment the reference to § 1326(b)(2). *See United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (remanding sua sponte to delete the reference to § 1326(b)).

AFFIRMED; REMANDED.